No. 98-1167

In The Supreme Court of the United States

OCTOBER TERM, 1998

EDWARD CHRISTENSEN, et al.,

Petitioners,

v.

HARRIS COUNTY, TEXAS, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Citations:

Statutes:

This is a dispute between Harris County, Texas, Deputy Sheriffs and their employer over whether compensatory time banks earned under the Fair Labor Standards Act, 29 U.S.C. § 207(o) may be depleted by compelling an employee to take compensatory time off in work periods in which the employee has no desire to do so. The deputies have sought *certiorari* requesting the Court to resolve a clear conflict between Circuit Courts of Appeals' interpretations of 29 U.S.C. § 207(o) with regard to the preservation and use of compensatory time earned in lieu of cash overtime.

The Respondent, Harris County, argues that this Petition should be denied because the admitted conflict between the Eighth Circuit's decision in *Heaton v. Moore*, 43 F.3d 1176 (8th Cir. 1994), *cert denied sub nom., Schriro v. Heaton*, 515 U.S. 1104 (1993) and the Fifth Circuit's decision below is somehow "irrelevant to the outcome of this case."

Harris County's argument rests on their claims: (1) that, even under *Heaton*, the County is entitled to summary judgment, and that (2) the *plain language* of the 1985 Amendments to the Fair Labor Standards Act provisions on compensatory time entitles them to summary judgment. Each of these propositions is faulty.

Heaton clearly supports the proposition that an employer may not compel employees to take compensatory time off as a means of depleting compensatory time banks. Just as clearly, there is no *plain language* in the statute that resolves this dispute.

First, the decision below is clear on its face that if *Heaton* had been followed in this case, the County would not be entitled to summary judgment. The majority writes that:

> Relying on the Eighth Circuit's opinion in *Heaton*, the class urges that since "banked compensatory time is the property of the employee," they have the right to "bank" comp time in "what amounts to an employee-owned savings account of compensatory time.". . .. In *Heaton*, the employer sought to require use of comp time before the use of annual leave. This case squarely presents the *Heaton* issue, and we must thus decide whether to extend *Alford* or to follow *Heaton*. . . . The reasoning in *Heaton* is flawed. App. at 10a.

While Judge Dennis in partial dissent recognizes the conflict with *Heaton*, he would remand the case to the trial court for reconsideration in light of *Auer v. Robbins*, 519 U.S. 452 (1997).

Second, neither the *plain language* of 29 U.S.C. § 207(o)(3)(B) nor an alleged single-minded, budget protection purpose of Congress in amending the FLSA to allow public sector compensatory time off in lieu of cash overtime support Harris County.

Harris County would read the first clause of 29 U.S.C. § 207(o)(3)(B) as a *plain language* statement of a Congressional intent that employers may compel employees, against their wishes, to use accrued compensatory time off. The County reads that clause as a grant of employer control over compensatory time banks. In fact, the clause is a

condition on the main clause of the sentence in which it is contained. The Congress legislated that "If compensatory time is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives that payment." 29 U.S.C. § 207. Harris County reads that as a *plain language* Congressional authorization for an employer to compel employees to burn off their compensatory time banks during work periods when the employee would prefer to preserve the bank. In fact, all the sentence does is set the rate at which compensatory time must be paid for when it is cashed out. Far from authorizing compensatory time to be bought out over the employees' objection, the provision only protects employees from employers who would seek to buy out compensatory time at low rates. A reading of the entire 1985 Amendments leaves no doubt that there are many occasions when compensatory time may be bought out, including at the cessation of employment or with the agreement of the employees. The *plain language* cited by Harris County does not expressly provide that an employer may force employees to use their compensatory time.

The Courts of Appeal which have addressed the question each agree that the *plain language* of the statute does not resolve the issue. See, this decision at App. A at 10a-11a and *Heaton* at 43 F.3d 1180. There is simply no foundation for the claim that the issue here is resolved by the *plain language of the statute*.

Further Harris County misreads the legislative history of the compensatory time off provision. Harris County claims

that the 1985 Amendments had a singular purpose -- "to assist local governments to avoid budget problems." There are two serious problems with this reading of the legislative history: (1) the 1985 Amendments, in fact, have a dual purpose of balancing the financial burden of FLSA compliance with the work spreading/worker protection goals of the Act; and (2) the published legislative history of the Amendments expressly contradicts Harris County's reading.

The 1985 Amendments to the FLSA had a dual purpose. As the Fifth Circuit explained:

> Rather than completely exclude agencies from the reach of the FLSA, Congress balanced the burden of complying with the FLSA's overtime provision *with protection for the worker*. The 1985 Amendments accomplished this *dual* purpose by allowing public employers to agree with empl[illegible]es to award comp time in lieu of monetary [illegible]nents .... App. at 9A (emphasis added)(citation omitted).

The importance of protecting the rights of the employee is also emphasized in the legislative history to the 1985 Amendments to the FLSA.

> While the Committee appreciates the employee protection principles and job creation purposes of the overtime provision of the Fair Labor Standards Act, it also recognizes the mutual benefits arising from a number of situations where state and local government employees and their employers have had agreements or

> longstanding arrangements where compensatory time off was provided for overtime hours worked by employees. Appendix at 62a.

The Committee further explained:

> The Committee is very concerned that public employees in offices with regular year-round functions, short staff, and steady demand will be urged to accrue many hours of compensatory time and then encounter difficulty in being able to make beneficial use of the accumulated compensatory time. It is the Committee's views that an employee should not be coerced to accept more compensatory time in lieu of overtime pay in a year than an employer realistically and in good faith expects to be able to grant to the employee if he or she requests it within a similar period. To do otherwise, would permit public employers to enjoy the fruits of the overtime labor of the employees without having to pay the overtime premium required by the Act. Clearly, compensatory time is not envisioned as a means to avoid overtime compensation. It is merely an alternative method of meeting that obligation. Where public employers find that they cannot make requested time off available even outside of the periods of increased demand that all public service operations experience in the course of their business, they should consider allowing employees to cash out requested but

> unavailable compensatory time. For those employees where the problem of disruption is persistent, compensatory time should not be the preferred method of compensation for overtime work. App. at 68a.

CONCLUSION

For these reasons and the reasons previously stated in the initial Petition, the Court should grant *certiorari*.

Respectfully Submitted,

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